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CASE NOTES

Bankruptcy—Multiple Damages—Right of Trustee to Maintain Action for Fraud.—*Jones v. Hicks*.¹—Plaintiff trustee in bankruptcy sought to recover quintuple damages, pursuant to a Michigan statute so providing,² from a deputy sheriff for an alleged fraudulent execution sale of the bankrupt's property. Prior to bankruptcy a judgment creditor caused a writ of execution to issue pursuant to which a truck of the now bankrupt, valued at \$1100 was seized and sold at public sale for \$375 to an agent of the sheriff who later transferred the truck to him. The trial court granted the defendant's motion to dismiss upon plaintiff's opening statement. The Supreme Court of Michigan affirmed. HELD: Any right to maintain an action for damages vesting in the bankruptcy trustee must pass to him by assignment. A right of action for fraud is personal and nonassignable. Three justices dissented on the ground that the trustee became vested with the bankrupt's title to the truck together with all his rights and remedies arising from the fraudulent sale.

The case involving the assignability of a right of action, § 70a(5) and (6) of the Bankruptcy Act³ is applicable. Under § 70a(5),⁴ if the bankrupt's right of action is to pass to the trustee it must be either transferable or attachable under state law.⁵ However, if § 70a(6) which provides for the vesting in the trustee of the bankrupt's "rights of action arising upon . . . the unlawful taking or detention of or injury to his property," is applicable, the trustee's title vests as of the date of the filing of the bankruptcy petition. In the latter instance the only limitation on the trustee's right is that the wrong complained of must be to property or property rights of the bankrupt and not to his person.⁶

In the instant case the court decided that the transferability of the bankrupt's cause of action for fraud was to be determined according to Michigan law, which recognizes the common law distinction between personal tort claims not assignable because incapable of surviving the claimant and tort claims involving injury to property assignable because capable of surviving the property owner.⁷ This classification seems to be at variance with holdings of recent cases to the effect that rights of action for fraud and deceit pass to the bankruptcy trustee if they involve damage to the bankrupt's property.⁸ The issue, then, would appear to revolve around the question as to

¹ 358 Mich. 474, 100 N.W.2d 243 (1960).

² Mich. Comp. Laws § 623. 148 (1948).

³ 30 Stat. 550 (1898), as amended, 11 U.S.C. § 110A (1958).

⁴ When § 70a(5) was amended in 1938 the words, "including rights of action," were inserted.

⁵ *Cobleigh v. State Land Office Board*, 305 Mich. 434, 9 N.W.2d 665 (1943).

⁶ *In Re Gay*, 182 Fed. 260 (D. Mass., 1910).

⁷ *Stebbins v. Dean*, 82 Mich. 385, 46 N.W. 778 (1890).

⁸ *In Re Harper*, 175 Fed. 412 (N.D.N.Y. 1910); *Connolly v. National Surety Co.*, 35 Ohio App. 76, 171 N.E. 870 (1929); *Constant v. Kulukundis*, 125 F. Supp. 305 (S.D. N.Y. 1954).

whether the action of the sheriff involves damage to property or property rights of the bankrupt under state law.

Notwithstanding the Michigan survival statute,⁹ it was held in *Cochran Timber Co. v. Fisher*,¹⁰ cited and followed in the principal case, that an action for fraud is nonassignable, a distinction being drawn between a naked cause of action for fraud which is nonassignable and a fraud claim connected with the transfer of some property to which a right of action attaches, which claim is regarded as assignable.¹¹

It has been a matter of some doubt as to whether causes of action involving statutory multiple damages pass to a trustee in bankruptcy, at least in respect to the multiple damages aspect. There are holdings both ways as to whether treble damage claims recoverable under antitrust laws pass to a trustee in bankruptcy.¹² It appears in Michigan that the multiple damage provision should not affect an otherwise assignable cause of action.¹³

The position taken by the dissenting judges reaches a more satisfactory result than that of the majority. The truck was tangible property, title to which would pass to the trustee upon his election to avoid the sale and replevy the vehicle. Consequently, the cause of action for fraud would pass to the trustee with the title to the truck. The fraud could then be considered as involving an injury to the bankrupt's property making § 70a(6) applicable.

However, even under § 70a(5) the purpose of the Bankruptcy Act would be better served if such rights of action are deemed to be transferable. Should the trustee be limited to an action to avoid the sale and recover the truck, its value to the estate may in the interim be materially decreased due to the lapse of time between the fraudulent sale and the trustee's appointment. At least depreciation of the value of the truck and possibly its total loss to the estate could be anticipated. Moreover, the primary purpose of the multiple damage statute which is to restrain public officials from conducting illegal execution sales would be better accomplished by allowing the trustee to sue on behalf of the estate.

JAMES P. KIERNAN

Chattel Mortgages—Sale of the Mortgaged Chattels on Default Without Notice to the Mortgagor—Protection of the Mortgagor's Equity.—*Veterans Loan Authority v. Wilk*.¹—The defendant took a loan from a bank in 1946, in return for which he gave the bank a promissory note, secured by a chattel mortgage. The note and mortgage were given within the terms

⁹ Mich. Comp. Laws § 612.32 (1948).

¹⁰ 190 Mich. 478, 157 N.W. 282 (1916).

¹¹ *Grand Trunk Western Railroad Co. v. H. W. Nelson Co.*, 116 F.2d 823 (6th Cir. 1941).

¹² *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110 (5th Cir. 1935); contra, *Bonvillain v. American Sugar Ref. Co.*, 250 Fed. 641 (D.C. La. 1918).

¹³ *Holmes v. Loud*, 149 Mich. 410, 112 N.W. 1109 (1907).

¹ 160 A.2d 138 (N.J. Super. 1960).